

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .2305

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

This Rule sets out the specific conditions governing General Permits applicable to bridge and culvert replacement projects over estuarine water or in public trust areas and coastal wetland AEC's.

In staff's opinion, the text of the Rule is unclear and ambiguous as to the limit placed on whether or not the General Permit shall be granted. The limiting language from Rule .2305(b) states that a bridge roadway deck shall not be expanded¹, "provided the proposed project does not create significant adverse impacts."

"[S]ignificant adverse impact" is undefined. It is counsel's position that the phrase is unclear and ambiguous, and this language could be used to deny an applicant's permit. The regulated public must understand exactly what is required of them and by what criteria a permit may be denied.

Coastal Resources has taken the position that this is a term of art, used in other rules, understood by the courts, and "is based on the goals of CAMA which require the CRC to balance the protection of natural resources with development. So, if the development will significantly adversely impact resources, then the two are not balanced." Even though "I know it when I see it" may work for Justice Potter Stewart when identifying obscenity, it is not sufficient for the North Carolina code.

Accordingly, staff recommends that the RRC object to 15A NCAC 07H .2305.

¹ Except a one-lane bridge may be expanded to two lanes.

Lawrence R. Duke
Commission Counsel

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 15A NCAC 07H .2305 is readopted with changes as published in 34:09 NCR 760 as follows:

2
3 **15A NCAC 07H .2305 SPECIFIC CONDITIONS**

4 (a) This ~~general permit~~ **General Permit** is applicable to bridge replacement projects spanning no more than 400 feet
5 of estuarine water, public trust area, and coastal wetland AECs.

6 (b) Existing roadway deck width shall not be expanded to create additional lanes, with the exception that an existing
7 one lane bridge may be expanded to two lanes ~~where the Department of Environment and Natural Resources~~
8 ~~Environmental Quality determines that authorization is warranted and provided~~ the proposed project does not
9 ~~significantly affect the quality of the human and natural environment or unnecessarily endangers adjoining properties.~~
10 ~~create significant adverse impacts.~~

11 (c) Replacement of existing bridges with new bridges shall not reduce vertical or horizontal navigational clearances.

12 (d) All demolition debris shall be disposed of landward of all wetlands and the ~~normal water level (NWL)~~ **Normal**
13 **Water Level** or **Normal High Water** ~~normal high water (NHW) level~~ **(NHW) level** ~~(as as~~ defined in **15A NCAC 07H .0106), 15A**
14 **NCAC 07H .0106**, and shall employ soil stabilization measures to prevent entry of sediments in the adjacent water
15 bodies or wetlands.

16 (e) Bridges and culverts shall be designed to allow passage of anticipated high water flows.

17 (f) Measures sufficient to restrain sedimentation and erosion shall be implemented at each site.

18 (g) Bridge or culvert replacement activities involving excavation or fill in wetlands, public trust areas, and estuarine
19 waters shall meet the following conditions:

20 (1) Replacing bridges with culverts shall not be allowed in primary nursery areas as defined by the
21 Marine Fisheries or Wildlife Resources Commissions.

22 (2) The total area of public trust area, estuarine waters, and wetlands to be excavated or filled shall not
23 exceed 2,500 square feet except that the coastal wetland component shall not exceed 750 square
24 feet.

25 (3) Culverts shall not be used to replace bridges with open water spans greater than 50 feet.

26 (4) There shall be no temporary placement or double handling of excavated or fill materials within
27 waters or vegetated wetlands.

28 (5) No excavated or fill material shall be placed in any wetlands or surrounding waters outside of the
29 alignment of the fill area indicated on the work ~~plat(s), plat.~~

30 (6) All excavated materials shall be confined above **Normal Water Level** ~~NWL~~ or **Normal High Water**
31 **NHW** and landward of any wetlands behind dikes or other retaining structures to prevent spill-over
32 of solids into any wetlands or surrounding waters.

33 (7) No bridges with a clearance of four feet or greater above the NWL or NHW shall be allowed to be
34 replaced with ~~culvert(s)~~ **culverts** unless the culvert design maintains the existing water depth,
35 vertical clearance and horizontal clearance.

36 (8) If a bridge is being replaced by a ~~culvert(s)~~ **culvert** then the width of the waterbody shall not be
37 decreased by more than 40 percent.

1 (9) All pipe and culvert inverts placed within the Public Trust or the Estuarine Waters AECs shall be
2 buried at least one foot below normal bed elevation to allow for passage of water and aquatic life.
3 Culverts placed in wetlands are not subject to this requirement.

4
5 *History Note:* *Authority G.S. 113A-107; 113A-118.1; 113A-124;*
6 *Eff. June 1, 1996;*
7 *Amended Eff. May 1, 2010;*
8 *Readopted Eff. October 1, 2022.*